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SUBJECT INDEX

CITATIONS

Cases:

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 466

LARRY DAYTON HUDSON,

Petitioner,

vs.

NORTH CAROLINA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

BRIEF FOR PETITIONER

Opinions Below

The Supreme Court of the State of North Carolina denied the petition for writ of certiorari without opinion. The judgment entered by the Clerk of the Supreme Court of North Carolina is not reported (R. 64).

The opinion of the Judge Presiding over the Superior Court of Cumberland County, North Carolina, dismissing the petition under the North Carolina Post-Conviction Act is not reported (R. 61-64).

Jurisdiction

The final judgment of the Supreme Court of the State of North Carolina was entered on January 15, 1959 (R. 64). Petition for certiorari was filed April 10, 1959 and was granted October 12, 1959. The jurisdiction of this Court rests on 28 U.S.C. 1257 (3).

Questions Presented

1. Whether the failure of the trial judge to grant petitioner's pre-trial request for the appointment of counsel to defend him on a charge of common law robbery, a felony, deprived him of liberty without due process of law, as guaranteed by the Fourteenth Amendment, petitioner being an eighteen-year-old boy without funds to employ counsel?

2. Whether the failure of the State of North Carolina to provide counsel at the request of this indigent petitioner, on trial for a felony, deprived him of the equal protection of the laws and of due process of law, as guaranteed by the Fourteenth Amendment, when by state law other defendants with means, facing similar charges would be entitled to counsel for their defense?

Statutes and Constitutional Provisions Involved

North Carolina General Statutes § 15-4 provides as follows:

> "*Accused Entitled to Counsel.*—Every person accused of any crime whatsoever, shall be entitled to counsel in all matters which may be necessary for his defense."

North Carolina Constitution, Article I, § 11 provides as follows:

> *"In Criminal Prosecutions.*—In all criminal prosecutions, every person charged with crime has the right to be informed of the accusation and to confront the accusers and witnesses with other testimony, and to have counsel for defense, and not be compelled to give self-incriminating evidence, or to pay costs, jail fees, or necessary witness fees of the defense, unless found guilty."

The Fourteenth Amendment to the United States Constitution provides in part as follows:

> "§ 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement

Petitioner, Larry Dayton Hudson, was arrested February 18, 1958 on a warrant charging him, Ray Starling and David Cain with larceny from the person (R. 1). Following a hearing on February 25, 1958 in the Recorder's Court of Cumberland County, the petitioner and the other defendants were bound over to the Superior Court of Cumberland County under $200.00 bond (R. 2-3). The record does not show that the petitioner or the other defendants were able to raise the $200.00 bond.

At the March Criminal Term of Cumberland County Superior Court, the grand jury returned an indictment charging the petitioner, Ray Starling, and David Cain with the robbery of $24.00 from the person of one W. G. Spell (R. 3). The case came on for trial on March 13, 1958 before Judge Heman Clark. The State of North Carolina was represented by the Solicitor and the Assistant Solicitor; co-defendant David Cain was represented by Hector McGeachy, Esquire, an attorney of his own selection, and the defendants, Larry Dayton Hudson and Ray Starling, were not represented by counsel (R. 4).

The petitioner, Larry Dayton Hudson, was then eighteen years old and had been only to the sixth grade in school (R. 63). He had previously been tried on several different occasions, and had been convicted of careless and reckless driving, of breaking and entering, and of driving under the influence of liquor (R. 41, 63). His co-defendant, Ray Starling, was then 23 years old (R. 36). Charges were also brought against a fourth defendant, Rubin Grimsley, but these had been transferred to the juvenile court because he was only 15 years old (R. 31, 32).

Before pleading to the bill of indictment, the petitioner, Larry Dayton Hudson, stated in open court: "I don't have funds to employ an attorney and am not capable of defending myself. If the Court please, I would like to ask the Court to employ me an attorney" (R. 4). The State admitted his inability to employ an attorney (R. 4). Judge Clark denied the motion, stating that "the Court will try to see that your rights are protected throughout the case" (R. 4).

All three of the defendants thereupon pleaded not guilty and the case proceeded immediately to trial. The principal witness for the State of North Carolina was W. G. Spell.

Midway through the direct examination of this witness, Attorney McGeachy offered to serve as counsel for petitioner and for defendant, Ray Starling, so long as their defense did not conflict with the interest of his client, David Cain (R. 6). Judge Clark made no ruling or comment at this time on this offer of counsel. After W. G. Spell had completed his direct testimony, the trial judge told Attorney McGeachy that he thought the interests of his client probably were in conflict with those of the other two defendants, and that he should cross-examine for his client alone, and not for the other two (R. 11).

This witness was questioned by Judge Clark regarding statements made in his presence by petitioner, Larry Dayton Hudson (R. 11, 12). Afterwards he was cross-examined intensively by Attorney McGeachy (R. 13-25), who brought out the witness' prior criminal record and his previous 18-month commitment to Dix Hill, a State mental institution (R. 24). Petitioner and co-defendant, Ray Starling, then followed with brief cross-examination of the witness (R. 23, 25, 26).

The only other witnesses for the State were two deputy sheriffs. Their testimony in large part dealt with statements which they said the defendants, David Cain, and Ray Starling had made to them. One such statement by Ray Starling was said to have been made in the presence of the petitioner, Larry Dayton Hudson, at a time when both were under arrest and were being held on the third floor of the jail (R. 29, 30). The trial judge ruled generally that these statements were admissible in evidence only against the defendants said to have been present when they were made. These two deputy sheriffs were cross-examined briefly by Attorney McGeachy, but were not cross-examined by the petitioner Larry Dayton Hudson, or by co-defendant Ray Starling (R. 31, 34).

At the conclusion of the State's evidence, Attorney McGeachy moved that the case be dismissed. This motion was overruled. Thereupon in open court he stated that the defendant Cain had no evidence to offer, and he tendered a plea of guilty to the offense of petty larceny, a misdemeanor, which plea was accepted by the State (R. 35).

The defendant Ray Starling, and the petitioner Larry Dayton Hudson then took the stand. Each made a statement in which he denied the charges against himself and further denied that W. G. Spell had been robbed. Petitioner was cross-examined with special emphasis being placed on his prior record (R. 41, 42). Neither petitioner nor his co-defendant, Ray Starling, produced any other witnesses or offered any further evidence. They were given an opportunity to argue their cases to the jury, but declined to do so (R. 45).

Following Judge Clark's charge to the jury, the jury returned verdicts of guilty to the lesser offense of larceny from the person against both the petitioner Larry Dayton Hudson and co-defendant Ray Starling.

The following day Judge Clark imposed a six months suspended sentence on the defendant David Cain. He sentenced the petitioner Larry Dayton Hudson to State's Prison for a period of not less than 3 nor more than 5 years. He sentenced the defendant Ray Starling to Cumberland County jail for a period of not less than 18 months nor more than 2 years, such time to be served on the roads (R. 55).

Two days later petitioner, Larry Dayton Hudson, by letter gave Notice of Appeal to the North Carolina Supreme Court (R. 56). His appearance bond was set at $2,500.00.

Petitioner next filed a petition for a writ of habeas corpus before Judge Leo Carr, who was presiding over Cumberland County Superior Court. Judge Carr issued the writ

on June 26, 1958, and entered an order later that day denying the relief requested (R. 63).

On the same date, Judge Carr, upon motion of the Solicitor, dismissed petitioner's pending appeal. The ground for dismissal of the appeal was the failure of the petitioner to serve his case on appeal upon the Solicitor on or before June 24, 1958, the deadline for this action (R. 58).

Thereafter petitioner Larry Dayton Hudson filed a "petition for a writ of certiorari" with the Cumberland County Superior Court. This petition was treated as a proceeding under the North Carolina Post-Conviction Act. Among the grounds urged for a new trial in the petition was the failure of the trial judge to provide him with counsel at his trial, after petitioner had asked the judge to do so (R. 59-61). Judge C. W. Hall appointed N. H. Person, a member of the Cumberland County Bar to represent petitioner at this hearing. On behalf of the State, the Solicitor orally denied the allegations of the petition and moved for its dismissal.

At the hearing Judge C. W. Hall took additional evidence and read the transcript of the trial. He found that the trial judge had apprised the petitioner of his rights to challenge the jury, to cross-examine witnesses and to argue his case to the jury. He concluded that the petitioner had received a fair and impartial trial, and that no special circumstances were shown which required the appointment of counsel. Accordingly, he ruled that the failure of the trial court to appoint counsel for the petitioner did not deprive him of due process of law or deny him any substantial constitutional right, and he dismissed his petition (R. 63, 64).

Thereafter petitioner Larry Dayton Hudson petitioned the North Carolina Supreme Court for a petition of certiorari to review Judge Hall's judgment. The North Caro-

lina Supreme Court denied the petition by order entered January 15, 1959 (R. 64). A petition for certiorari to this court, asking for a review of the judgment of the North Carolina Supreme Court was filed April 10, 1959. This Court granted the petition on October 12, 1959. By order of this Court on November 9, 1959, the motion for appointment of counsel was granted, and William Joslin, Esquire, of Raleigh, North Carolina, a member of the Bar of this Court, was appointed to represent him.

Summary of Argument

1. The Fourteenth Amendment to the United States Constitution forbids any State to deprive a person of his liberty without due process of law.

This Amendment, as interpreted by this Court, requires a State to provide counsel for a defendant charged with a non-capital felony where special circumstances show his inability to make his own defense. *Betts* v. *Brady*, 316 U. S. 455, 62 S. Ct. 1252 (1942); *Uveges* v. *Pennsylvania*, 335 U. S. 437, 69 S. Ct. 184 (1948).

In this case, the petitioner, who was an eighteen-year-old boy with only a sixth grade education, was charged with the crime of robbery, a felony. He lacked the funds to hire his own attorney, and before pleading to the indictment, requested the trial court to appoint an attorney for him, stating that he was unable to defend himself. Under these circumstances, the failure of the trial court to name an attorney for him, and his subsequent conviction, deprived him of his liberty without due process of law. The *facts of record* in this case are almost identical with those set forth in *Wade* v. *Mayo*, 334 U. S. 672, 68 S. Ct. 1270 (1948) and clearly bring this case within the holding of this Court in the *Wade* case.

Moreover, the vast majority of states, by constitution, statute, rule of court, or court decision, now require the appointment of counsel, upon request, in all felonies or "serious" cases. The due process clause, reflecting as it does the recognized standards of fairness in our society thus includes a requirement that a defendant be provided with counsel under these circumstances.

2. The Fourteenth Amendment to the United States Constitution forbids any State to deny to any person within its jurisdiction the equal protection of the laws. The State of North Carolina tried and convicted petitioner on a felony charge without counsel for his defense, although he requested the appointment of counsel in apt time for the reason that he lacked funds to hire his own lawyer. Petitioner was denied the assistance of counsel under circumstances where one with adequate means who faced a similar charge would have a constitutional right to retain his own counsel.

This Court has held that, although the due process clause does not require that a State provide a right of appeal for a defendant; yet, if it does give such a right, it cannot in effect deny the right to poor defendants. The due process clause and the equal protection clause of the Fourteenth Amendment forbid such a discrimination based upon financial means. *Griffin* v. *Illinois*, 351 U. S. 12, 76 S. Ct. 585 (1956).

North Carolina guarantees to every defendant in criminal cases the "benefit of counsel." But petitioner in this case despite a timely request was denied that right because of his poverty. The right to counsel is an even more fundamental ingredient of a fair hearing and trial than the right of appeal. Thus petitioner lost this fundamental right solely because he lacked the means to assert it. Such discrimina-

tion violates petitioner's right to the equal protection of the laws, and to due process, as guaranted by the Fourteenth Amendment.

ARGUMENT

1.

The Petitioner Was Deprived of His Liberty Without Due Process of Law Guaranteed by the Fourteenth Amendment by the Failure of the Trial Judge to Honor His Timely Request for the Appointment of Counsel, and by His Subsequent Conviction of a Felony.

A—Introduction

The petitioner, an eighteen-year-old youth with a sixth grade education, as soon as his case was called, told the trial judge that he had no funds to employ an attorney, was incapable of conducting his own defense, and requested the Court to employ an attorney for him. The Solicitor admitted petitioner's inability to hire a lawyer, but refused to say whether or not he was able to represent himself.

The petitioner was facing an indictment for the offense of common law robbery. This crime is not defined in the North Carolina General Statutes, but the essential elements of the crime are set out in numerous decisions of the North Carolina Supreme Court. See, for example, *State* v. *Brown*, 113 NC 645, 18 SE 51 (1893); *State* v. *Lunsford*, 229 NC 229, 49 SE 2d 410 (1948); *State* v. *Sipes*, 233 NC 633, 65 SE 2d 127 (1951).

The crime of common law robbery constitutes a felony under North Carolina law. *In re Ferguson*, 235 NC 121, 68 SE 2d 792 (1952). The maximum and minimum punishment for this crime is found in the section applicable to

felonies in general. North Carolina General Statutes § 14.2 provides that a person convicted of a felony "for which no specific punishment is prescribed by statute shall be imprisoned in the County jail or State prison not exceeding two years, or be fined in the discretion of the court, or, if the offense be infamous, the person offending shall be imprisoned in the County jail or State prison not less than four months nor more than ten years, or be fined." Under this provision the North Carolina Supreme Court has held that the maximum sentence for one convicted of common law robbery is ten years in State's prison. *In re Sellers*, 234 NC 648, 68 SE 2d 308 (1951).

Likewise the crime of larceny from the person, of which the petitioner was convicted, is a felony punishable in the court's discretion by imprisonment in State's prison for a period not exceeding ten years. North Carolina General Statutes §§ 14-70, 14-72; *State* v. *Bynum*, 117 NC 749, 23 SE 218 (1895); *State* v. *Harris*, 119 NC 811, 26 SE 148 (1896).

The petitioner was thus tried and convicted of a felony without the assistance of counsel for his defense, although he had made a timely request for the appointment of counsel. After having been convicted, petitioner sought to take an appeal, as allowed by law; however, he, a layman, failed to comply with the North Carolina procedural requirement for preparing and serving his "case on appeal" on the Solicitor within the time allowed. Hence, he lost his right to appeal on the merits of his conviction, again for lack of a lawyer's aid in complying with the rules of procedure.

Petitioner next sought a review of his trial and conviction through the avenue available to all North Carolina prisoners who claim a denial of their constitutional rights, namely, the North Carolina Post-Conviction Act. North

Carolina General Statutes § 15-217 et seq. This Act provides a remedy analogous to the common law writ of error coram nobis. This procedure only applies to questions of a denial of constitutional rights, and cannot be used as a substitute for an appeal, or as a means to raise legal questions that could have been raised by an appeal. *State* v. *Cruse*, 238 NC 53, 76 SE 2d 320 (1953).

Upon the filing of the petition with the trial court, the judge appoints counsel for the prisoner, if he requests counsel and if the judge is satisfied that he lacks the means to obtain counsel. This appointment is made regardless of the crime, whether felony or misdemeanor, for which the prisoner has been convicted. North Carolina General Statutes § 15-219.

Accordingly, in this case, upon receipt of petitioner's "Petition for Writ of Certiorari", again asking for appointment of counsel (R. 61), Judge Hall of the Superior Court appointed N. H. Person, a member of the local bar, to represent him. The gravamen of the petition was the refusal of the trial judge to appoint counsel upon request at the trial. Thus, this case presents the anomalous situation of the court as a matter of right appointing counsel for an indigent prisoner to help him argue that his constitutional right to a fair trial had been denied by the failure of the trial judge to appoint counsel for him upon his request at his original trial. If counsel were needed in petitioner's Post-Conviction hearing limited to constitutional questions, how much greater was his need at the original trial when counsel could have assisted him on questions of trial tactics, admissibility of evidence, criminal procedure and argument to the judge and jury, as well as on constitutional questions!

B—This Case Comes Within the Category of "Special Circumstances" Previously Recognized by This Court in Non-Capital Cases as Requiring Appointment of Counsel Under the Due Process Clause

This Court has adhered to the well-established rule that the due process clause of the Fourteenth Amendment to the United States Constitution incorporates those rights and protections for an accused that are "implicit in the concept of ordered liberty." *Palko* v. *Connecticut*, 302 U. S. 319, 325, 58 S. Ct. 149, 152 (1937); see also *Bartkus* v. *Illinois*, 359 U. S. 121, 127-128; 79 S. Ct. 676, 680 (1959). In each case it is necessary to consider whether the denial of a given right imposed a hardship on the defendant "so acute and shocking that our polity will not endure it. Does it violate those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions?" *Palko* v. *Connecticut*, 302 U. S. 319, 328, 58 S. Ct. 149, 153 (1937).

This definition of the meaning of the due process clause of the Fourteenth Amendment necessarily allows a certain area for growth and development as new situations arise. "It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at any given time be deemed the limits or the essentials of fundamental rights." *Wolf* v. *Colorado*, 338 U. S. 25, 27, 69 S. Ct. 1359, 1361 (1949).

Beginning with the well-known case of *Powell* v. *Alabama*, 287 U. S. 45, 53 S. Ct. 55 (1932), this court has applied the due process clause in a variety of situations where a defendant in a state court prosecution alleges a violation of due process of law in that the State failed to appoint counsel

for his defense. Although the *Powell* case dealt with a defendant accused of a capital offense, the reasoning of Justice Sutherland applies with equal force to non-capital cases as well: "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel, he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." *Powell* v. *Alabama*, 287 U. S. 45, 68-69, 53 S. Ct. 55, 64 (1932).

The strict holding of the *Powell* case was that in a capital case, where the defendant is unable to employ counsel, and is incapable of making his own defense, the trial court, whether requested or not, must assign counsel for him as a necessary requisite to due process of law.

In line with this holding, this Court has reversed state decisions upholding convictions in capital cases where the record failed to show that the defendant's right to counsel had been adequately protected. *Williams* v. *Kaiser*, 323 U. S. 471; 65 S. Ct. 363 (1945); *Tompkins* v. *Missouri*, 323 U. S. 485, 65 S. Ct. 370 (1945); *Hawk* v. *Olson*, 326 U. S. 271, 66 S. Ct. 116 (1945). See *Moore* v. *Michigan*, 355 U. S. 155, 78 S. Ct. 191 (1957); *Reece* v. *Georgia*, 350 U. S. 85, 76 S. Ct. 167 (1956); *DeMeerleer* v. *Michigan*, 329 U. S. 663, 67 S. Ct. 596 (1947).

This same principle has been applied in non-capital cases. Through a long time of decisions this Court has evolved the rule that due process requires the assistance of counsel in state non-capital prosecutions where the accused, because of special circumstances, is incapable of adequately making his own defense and understandingly waiving his constitutional right to counsel. *Betts* v. *Brady*, 316 U. S. 455, 62 S. Ct. 1252 (1942); *Foster* v. *Illinois*, 332 U. S. 134, 67 S. Ct. 1716 (1947); *Gibbs* v. *Burke*, 337 U. S. 773, 69 S. Ct. 1247 (1949).

This Court has applied this rule by examining into the circumstances of each case where a denial of due process has been urged because of failure to appoint counsel at the trial. In this way this court has pointed out a number of the special conditions that may indicate a need for counsel. Thus the youth of the defendant was an important consideration in *Uveges* v. *Pennsylvania*, 335 U. S. 437, 69 S. Ct. 184 (1948), in *DeMeerleer* v. *Michigan*, 329 U. S. 663, 67 S. Ct. 596 (1947); and in *Wade* v. *Mayo*, 334 U. S. 672, 68 S. Ct. 1270 (1948). The lack of formal education of the defendant was noted by this Court in *Pennsylvania ex rel. Herman* v. *Claudy*, 350 U. S. 116, 76 S. Ct. 223 (1956), and in *Cash* v. *Culver*, 358 U. S. 633, 79 S. Ct. 432 (1959). The fact that incompetent evidence was introduced, or that erroneous rulings of law went unchallenged at the trial were the special circumstances in *Townsend* v. *Burke*, 334 U. S. 736, 68 S. Ct. 1252 (1948); and in *Gibbs* v. *Burke*, 337 U. S. 773, 69 S. Ct. 1247 (1949).

In *Wade* v. *Mayo*, 334 U. S. 672, 68 S. Ct. 1270 (1948), this Court held that the State of Florida had denied the petitioner due process of law by the refusal of the trial court to honor a request for the appointment of defense counsel. The *Wade* case is very nearly on all fours with this case. The facts are summarized in the opinion: "On Feb-

ruary 19, 1945 petitioner Wade was arrested in Palm Beach County, Florida upon the charge of breaking and entering. He was held in jail until brought to trial before a jury on March 14, 1945, in the Criminal Court of Record of Palm Beach County. Just before the trial started, he asked the trial judge to appoint counsel to represent him, claiming that it was financially impossible to employ one himself. The judge refused the request and the trial proceeded. The jury returned a verdict of guilty on the same day and Wade was immediately sentenced to serve five years in the state penitentiary." 334 U. S. 672, 675, 68 S. Ct. 1270, 1272 (1948).

"It appears that petitioner, at the time of his trial in the Criminal Court of Record of Palm Beach, Florida, was eighteen years old, and though not wholly a stranger to the Courtroom, having been convicted of prior offenses, was still an inexperienced youth unfamiliar with Court procedure, and not capable of adequately representing himself. . . .

"As the Circuit Court of Appeals pointed out, the evidence at the hearing before the District Court further showed that during the progress of the trial Wade (a) was advised by the trial judge of his right to challenge jurors and excuse as many as six without reason, a right which he did not exercise; (b) was afforded an opportunity, which he accepted, to cross examine state witnesses; (c) took the stand and testified in his own behalf; and (d) was offered the privilege of arguing his case to the jury but declined, as did the prosecuting attorney." 334 U. S. 672, 683, 68 S. Ct. 1270, 1276 (1948).

Thus in this case, which as the Court said "apparently involved no complicated legal questions," the refusal to honor petitioner's timely request for appointment of counsel was held to have violated his constitutional rights. The dissenting opinion found no fault with the conclusion of the majority on the constitutional question; instead, it was based

upon a failure to exhaust state remedies before resort to the federal courts. 334 U. S. 672, 684, 68 S. Ct. 1270, 1276 (1948).

The points of similarity between this case and petitioner Hudson's case are striking. Both involved eighteen-year-old defendants of limited education who were charged with the commission of a non-capital felony. Both had prior criminal records and thus had some familiarity with the courtroom. Both made timely requests of the trial judge for the appointment of counsel, and both had their requests denied. Both participated to a limited extent in their defense by the cross-examination of at least one witness and by taking the stand. Both were convicted and given prison sentences in the State penitentiary.

In the *Wade* case the federal district court found as a fact that the petitioner was incapable of adequately representing himself. In this case petitioner told the trial judge that he was incapable of defending himself before the trial began (R. 4). Neither Judge Clark, who tried petitioner Hudson, nor Judge Hall, who heard his Post-Conviction petition, found as a fact that petitioner at this trial was capable of adequately representing himself, although Judge Hall did find that petitioner Hudson was "intelligent, well informed, and was familiar with and experienced in Court procedure and criminal trials," and that he, conducting his own defense, was recently acquitted on robbery and assault charges (R. 63). Such a finding must be viewed in light of the facts shown in the record, namely, petitioner's sixth grade education, his use of poor English, his failure to call witnesses for his own defense, his failure to cross-examine the deputy sheriffs who testified against him, his decision to take the stand despite his prior criminal record, his failure to argue to the jury, and his failure to object when his co-defendant changed his plea to guilty in the presence

of the jury. Certainly petitioner Hudson was "intelligent, well informed and was familiar with Court procedure and criminal trials"—enough so to know that he needed a lawyer to defend him on this serious charge of robbery, and intelligent enough to know that "the lawyer who represents himself in Court has a fool for a client."

The "special circumstances" of this case as shown by the record clearly bring it within the line of decisions of this Court on the right to counsel, and particularly within the holding in *Wade* v. *Mayo*, 334 U. S. 672, 68 S. Ct. 1270 (1948).

The fair trial test as approved by this Court involves a perusal by this Court of the record of the trial to determine, among other things, whether that record reveals that the trial judge or the prosecution took advantage of the defendant, permitted inadmissible evidence to be introduced, or made erroneous rulings of law. But without the assistance of counsel, a defendant labors under a serious handicap to make the record show proper exceptions to all of the rulings of the trial judge and to give a complete account of the trial proceedings. See *Foster* v. *Illinois*, 332 U. S. 134, 67 S. Ct. 1716 (1947); *Chessman* v. *Teets*, 350 U. S. 3; 76 S. Ct. 34 (1955). Thus a defendant who is denied counsel must show to a reviewing court an element of unfairness in his trial when he lacks the assistance of one trained to do this very job. Due process of law cannot be confined and limited by such circular reasoning.

In summary, the special circumstances of this case, namely, the youthfulness of the petitioner, his lack of formal education, his timely request for the appointment of counsel, his inability to hire a lawyer, and his own fumbling defense against the serious charge of robbery, taken together show that he was deprived of his liberty without due proc-

ess of law by the failure of the trial judge to appoint counsel for him. These special circumstances bring petitioner's case within the long line of due process cases decided by this Court applying the so-called "fair trial" test in right to counsel cases not involving capital offenses.

C—In Addition, the Denial of Counsel to an Eighteen-Year-Old Youth, Facing Felony Charges, Who Is Too Poor to Hire a Lawyer and Who Makes Timely Request of the Trial Judge for the Appointment of Counsel, Is Such an Affront to the Conscience of Our Society as to Be Forbidden by the Due Process Clause of the Fourteenth Amendment

Although this case falls well within prior holdings of this Court, there is, however, a more fundamental reason why the failure of the trial court to appoint counsel for petitioner upon his timely request deprived him of due process of law. The concept of due process of law is a living principle and cannot be "confined within a permanent catalogue of what may at any time be deemed the limits or the essentials of fundamental rights." *Wolf* v. *Colorado*, 338 U. S. 25, 27, 69 S. Ct. 1359, 1361 (1949).

"Due process is, perhaps, the least frozen concept of our law—the least confined to history and the most absorptive of powerful social standards of a progressive society." Justice Frankfurter, concurring in *Griffin* v. *Illinois*, 351 U. S. 12, 20-21; 76 S. Ct. 585, 591 (1956).

In the federal courts, Rules 5(b) and 44 of the Federal Rules of Criminal Procedure, aside from the provisions of the Sixth Amendment, require that the defendant be advised of his right to counsel and further require that counsel be assigned to him at every stage, unless counsel is intelligently waived. 18 U. S. C. following § 687, 327 U. S. 835,

866-867. Most states now by constitution, statute, rule of court, or court decision require the appointment of counsel for an indigent defendant either upon request or as a matter of course, in all felony trials, or in all "serious" cases. Fellman: *The Right to Counsel under State Law*, 1955 Wisc. L. Rev. 281 (1955); Beaney: *The Right to Counsel in American Courts* (1955) pp. 80-141. Since 1930 the American Law Institute in its Code of Criminal Procedure has provided for the appointment of counsel in all felonies, unless the accused retained his own counsel or objected to the appointment. A.L.I.: *Code of Criminal Procedure* (1930), c. 8, § 203.

The debate within the legal profession and among students of the problem has largely moved beyond the question of *whether* the courts of this nation, state and federal, should provide counsel for indigent defendants. The question now has largely become one of *how* counsel for indigent defendants can best be supplied.

As one student of the problem observes, "the law now practically requires either the establishment of a Public Defender System or the subsidization of an institution, such as the Legal Aid Association, which is recognized as qualified to do the job." Williams: *The Indigent Defendant*, 45 ABAJ. 147 (Feb. 1959). The public-defender system, legal aid societies, legal reference plans, and assignment of counsel by the courts are among the plans in use. Brownell: *Legal Aid in the United States* (1951). Each has its own supporters and opponents. See for example, Dimock: *The Public Defender: A Step Towards a Police State*, 42 ABAJ. 219 (March, 1956); and Harrington and Getty: *The Public Defender: A Progressive Step Towards Justice*, 42 ABAJ. 1139 (Dec. 1956). But, whatever the method used to supply counsel for indigent defendants, this debate over the *method* illustrates the general acceptance of the premise that our

system of justice requires that indigent defendants be provided with counsel.

Thus the denial of counsel under the circumstances of this case, the petitioner submits, is a practice which disturbs and shocks the conscience of our society to such an extent that is almost everywhere forbidden. See *Bartkus* v. *Illinois*, 359 U. S. 121, 128, 79 S. Ct. 676 (1959).

Moreover, where the record shows clearly that an indigent defendant charged with a felony requested the trial judge to appoint counsel for him, stating that he was incapable of defending himself, and the trial judge refused his request, the trial judge assumes a heavy burden of responsibility for safeguarding the rights of the defendant. Particularly is this true where, as in this case, another defendant who had his own counsel and whose interests might clash with those of the defendant without counsel is placed on trial with him. Under our adversary system of court procedure and trials, justice requires that the state and the defendant in a criminal case be on a parity at the outset of a trial. Of course, the defendant is not entitled to a lawyer necessarily as competent as the solicitor. But fairness requires that, if the defendant, before the trial starts, recognizing his inability to defend himself and his lack of funds to hire counsel for his assistance, requests the trial judge to appoint counsel for him, the trial judge must honor this request. Commenting on the denial of youthful defendants' requests for appointment of counsel, an authority on this question observes: "Whether the trial judge acts fairly or not is beside the point. The prosecution has three advantages which the defense lacks: investigation of the facts, preparation for the trial, and effective presentation. Guilty or not, a man found guilty after this type of proceeding will inevitably feel that society has done him a great wrong." Beaney: *The Right to Counsel in American*

Courts (1955), p. 208. A requirement that counsel be appointed under these conditions reflects the civilized standard of criminal justice almost universally recognized in this country today. Such a requirement has in fact been set forth in dicta in several cases by the Supreme Court of North Carolina. See *State* v. *Cruse*, 238 NC 53, 59, 76 SE 2d 320, 325 (1953); *State* v. *Hardy*, 189 NC 799, 802, 128 SE 152, 153 (1925). But see *State* v. *Hackney*, 240 NC 230, 81 SE 2d 778 (1954).

The record in this case shows clearly and unequivocally that petitioner, knowing his own inadequacy to conduct his defense against a robbery charge, made a timely request of the trial judge for the appointment of counsel. The refusal of the trial court to grant this request constitutes a sufficient showing of a denial of due process of law as guaranteed by the Fourteenth Amendment to require a reversal of this case. This Court would only be giving the due process clause a meaning consistent with well recognized standards of fairness and justice to hold that a defendant, accused of a felony or serious crime, who made a timely request for appointment of counsel, was entitled to such counsel before proceeding to trial.

2.

The Refusal of the North Carolina Court to Appoint Counsel for the Petitioner, Who Was Too Poor to Hire His Own Attorney and Who Had Requested Such Appointment, Denied Petitioner the Equal Protection of the Laws and Due Process of Law as Guaranteed by the Fourteenth Amendment, When Other Defendants With Adequate Means Would, Under State Law, Have a Right to the Benefit of Counsel.

This Court has held that the equal protection clause and the due process clause together forbid a state to discriminate against an indigent defendant in the administration of its criminal law. Specifically the Court faced the problem posed by the task of conforming state appellate procedures to the requirements of the Amendment. In *Griffin* v. *Illinois*, 351 U. S. 12, 76 S. Ct. 585 (1956) the State of Illinois had refused to furnish a free copy of the trial proceedings to an indigent defendant, convicted of armed robbery, who sought to perfect an appeal. A copy of such proceedings would have been available to the defendant had he been able to pay the necessary fees. For lack of this record, he could not perfect his appeal. This Court held that under the Fourteenth Amendment Illinois could not, on account of poverty, discriminate in its allowance of appellate review. The Court said:

"Surely no one would contend that either a State or the Federal Government could constitutionally provide that defendants unable to pay court costs in advance should be denied the right to plead not guilty or to defend themselves in court. Such a law would make the constitutional promise of a fair trial a worthless thing. Notice, the right to be heard, and the right to counsel would under such circumstances be meaningless promises to the poor. In criminal

trials a State can no more discriminate on account of poverty than on account of religion, race, or color . . . " " . . . There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts." *Griffin* v. *Illinois*, 351 U. S. 12, 17, 19, 76 S. Ct. 585, 590, 591 (1956).

This same governing principle—that the essential elements of a fair trial cannot be denied by a state to any defendant on account of his poverty—has been applied by this Court in similar situations. In *Eskridge* v. *Washington Prison Board*, 357 U. S. 214, 78 S. Ct. 1061 (1958), this Court reaffirmed the *Griffin* case, holding in a per curiam opinion that the State of Washington under the Fourteenth Amendment must not deny to an indigent defendant an appellate review of his conviction, if it permits such review to defendants who can afford the expense of a trial transcript.

Again in *Burn[illegible] Ohio*, 360 U. S. 252, 79 S. Ct. 1164 (1959) this Court held that the failure of the Supreme Court of Ohio to docket an in forma pauperis appeal in a criminal case because the defendant did not pay the docketing fees was a denial of equal justice under law when defendants able to pay these fees were permitted to docket their appeals.

Under the applicable North Carolina statutory and constitutional provisions, a defendant in any criminal case has a right to appear and to defend through counsel of his own selection. North Carolina General Statutes § 15-4; North Carolina Constitution, Art. I, § 11. As interpreted by the North Carolina Supreme Court, the defendant in any criminal case is entitled to the benefit of counsel. See *State*

v. *Hedgebeth*, 228 NC 259, 265, 45 SE 2d 563 (1947); affirmed on a non-federal ground 334 U. S. 806, 68 S. Ct. 1185 (1947). The benefit of counsel under state law exceeds in scope the right to counsel. The traditional right to counsel is that constitutional right as contained in the due process clause of the Fourteenth Amendment and covering all capital cases, and also non-capital cases under special circumstances. But the "benefit of counsel" guaranteed under North Carolina law, extends to all criminal cases, whether felonies or misdemeanors. "The right of every man, accused, prosecuted, or put on trial upon a criminal charge, to be heard, and to have counsel in all matters necessary for his defense, and the right of counsel to argue to the jury the whole case, as well of law as of fact, is too fundamental for discussion." *State* v. *Hardy*, 189 NC 799, 802, 128 SE 152, 153 (1925).

The circumstances of this case serve to point up one obvious way in which petitioner was handicapped by the failure of the trial judge to appoint counsel as requested. Petitioner's co-defendant, David Cain, who employed his own attorney, pleaded guilty to petty larceny and only drew a suspended sentence; petitioner and co-defendant Starling without counsel were found guilty by the jury of a felony and both were sentenced to prison. Certainly counsel experienced in criminal trials can often best serve his client's interests by recommending that, at the appropriate time, a plea of guilty be tendered to a lesser offense. Petitioner's own trial thus demonstrates one of the many ways that counsel for the defense did in fact help in this case.

The North Carolina Legislature in 1951, when it adopted the State's Post-Conviction Act (North Carolina General Statutes § 15-217 *et seq.*) recognized that the right of review thereby granted could become an empty gesture for an in-

digent prisoner. Accordingly, it provided for the appointment of counsel for any prisoner unable to pay for his own lawyer. The State has thus already recognized how fundamental this right is in criminal proceedings.

However, North Carolina law as applied in this case, denies to a defendant who at his trial requests the aid of counsel but who cannot pay for it, that "benefit of counsel" enjoyed by defendants of more modest means. The State thus draws an economic line; all defendants accused of felonies who can pay for counsel are permitted the privilege of defending through counsel, but defendants accused of felonies who cannot pay for counsel must fend for themselves, in the absence of special circumstances requiring appointment of counsel.

The right to be heard through counsel at the trial of a criminal case is as essential to a fair hearing and determination as is the right of appeal. See *Powell* v. *Alabama*, 287 U. S. 45, SE, 53 S. Ct. 55, 64 (1932); *Chandler* v. *Fretag*, 348 U. S. 3, 75 S. Ct. (1954). Compare *Griffin* v. *Illinois*, 351 U. S. 12, 17, 76 S. Ct. 585, 590 (1956). It follows that, since a denial of an appellate review on the ground of poverty is a deprivation of the equal protection of the laws and of due process guaranteed by the Fourteenth Amendment, a denial of the benefit of counsel on the ground of poverty is likewise a deprivation of the rights protected by the same constitutional provisions. So long as North Carolina by statute and constitution guarantees the benefit of counsel to defendants in its courts, the equal protection clause and due process clause demand that it make such benefit available to indigent defendants. As this Court said in *Griffin* v. *Illinois*, 351 U. S. 12, 17, 76 S. Ct. 585, 590 (1956):

"In this tradition, our constitutional guarantees of due process and equal protection both call for procedures in

criminal trials which allow no invidious discriminations between persons and different groups of persons. Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American Court.' Chambers v. Florida, 309 U. S. 227, 241. See also Yick Wo v. Hopkins, 118 U. S. 356, 369."

In conclusion, the equal protection clause and the due process clause of the Fourteenth Amendment forbid the State to discriminate against any defendant charged with a felony who is too poor to hire an attorney for his defense. These clauses require that the State, if it guarantees the benefit of counsel to those defendants who can pay their own attorneys, also provide, at least in a felony case, counsel for an indigent defendant who makes timely request for the appointment of an attorney.

Conclusion

For the foregoing reasons, the judgment of the Supreme Court of North Carolina should be reversed.

Respectfully submitted.

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